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Superior Court of California  
County of Los Angeles

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Sherri R. Clark, Executive Officer/Clerk

By Anthony Ortiz, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

WARK ENTERTAINMENT, INC.	)	Case No. BC 602287
	)	Related to
Plaintiff,	)	Case No. BC 602548
	)	
vs.	)	Ruling
	)	
TWENTIETH CENTURY FOX FILM CORP.,	)	
et al.,	)	
	)	
Defendants.	)	

The motions to Vacate or Correct Arbitration Award, Confirm Arbitration Award and to Seal were heard on April 29, 2019. Appearing on behalf of Plaintiffs Temperance Brennan, L.P., Snooker Doodle Productions, Inc. and Bertha Blue, Inc. was Daniel A. Saunders, esq., appearing for Plaintiff Wark Entertainment, Inc., was Dale F. Kinsella, esq. and appearing for Defendants, Twentieth Century Fox Film Corporation, Fox Broadcasting Company and Fox Entertainment Group, Inc., were Daniel M. Petrocelli, esq. and Glenn D. Pomerantz, esq. The court heard extensive oral argument and took the matter under submission. The court now rules as follows.

At issue are the claims of Plaintiffs Wark Entertainment, Inc. f/s/o Barry Josephson ("Josephson"); Temperance Brennan, L.P. f/s/o Kathleen Reichs ("Reichs"); Snooker Doodle Productions, Inc. f/s/o Emily Deschanel ("Deschanel"); and Bertha Blue, Inc. f/s/o David

1 Boreanaz (“Boreanaz”) (collectively, “Plaintiffs”) against Twentieth Century Fox Film  
2 Corporation (“TCF”); Fox Entertainment Group, LLC; Twenty-First Century Fox, Inc., and Fox  
3 Broadcasting Company (collectively, “Fox”) relating to the television series *Bones*.

4 The claims emanate from Plaintiffs’ agreements with Fox which include contingent  
5 compensation. To ensure Plaintiffs’ contingent compensation remained fair, TCF was required to  
6 transact with its affiliate distributors on equally favorable terms when compared to its  
7 transactions with its non-affiliate distributors. Plaintiffs contend that TCF breached this  
8 obligation in multiple licensing transactions – domestic broadcasting, international licensing, and  
9 streaming – and they assert claims against TCF (the party with whom they contracted) and its  
10 affiliates (nonparties to the agreements) for breach of contract, fraud, tortious interference with  
11 contract and inducing breach of contract. TCF denies the claims brought by Plaintiffs and asserts  
12 that it carried out all its contractual obligations and duties.

13 On April 15, 2016, this court ordered the action stayed pursuant to Defendants’ Motion to  
14 Compel Arbitration. (Declaration of Molly M. Lens (“Lens Decl.”) ¶ 3; Exh. B.) On February  
15 20, 2019, a JAMS Arbitrator issued an Amended Final Award, Case Reference No. 1220052735.  
16 (Lens Decl. ¶ 4; Exh. C.) The Arbitrator found for Plaintiffs, awarding them a total of  
17 \$178,695,778.90, of which \$128,455,730 was punitive damages. (Amended Final Award, p. 65.)

18 The following motions are made:

- 19
- 20 (1) Plaintiffs’ motion to confirm the arbitration award;
  - 21 (2) Fox’s motion to vacate or correct the arbitration award;
  - 22 (3) Fox’s motion to seal portions of the exhibits filed in support of its motion  
23 to vacate or correct the arbitration award.

24

25 **1. Confirm, vacate, or correct award**

26

27 The Arbitrator awarded Plaintiffs a total of \$32,769,473 in actual damages, plus  
28 prejudgment interest, attorneys’ fees, costs, and arbiter’s fees. In addition, the Arbitrator awarded

1 Plaintiffs \$128,455,730 in punitive damages. Plaintiffs move to confirm the award. Fox moves to  
2 vacate or correct the award on the ground that the Arbitrator exceeded his powers by awarding  
3 punitive damages.

4 The Plaintiffs in this action are creators, producers, and actors involved in the television  
5 series *Bones*. In late 2004 and early 2005, plaintiffs each entered into contracts with TCF, under  
6 which they licensed their rights in *Bones* to TCF, in exchange for certain guaranteed and  
7 contingent compensation. Each contract contains a materially identical "Distribution Controls"  
8 paragraph. (Lens Decl., Exh. A, ¶ 10.) The paragraph reads in relevant part:

9  
10 **b. Dealings with Affiliates:** . . . Each of Company and Artist further  
11 acknowledges that Fox has informed Company and Artist that Fox intends to make use of  
12 Affiliated Companies in connection with its distribution and exploitation of the Series . . .  
13 . Each of Company and Artist expressly waive any right to object to such distribution and  
14 exploitation . . . or assert any claim that Fox should have offered the applicable  
15 distribution/exploitation rights to unaffiliated third parties . . . . *In consideration thereof,*  
16 *Fox agrees that Fox's transactions with Affiliated Companies will be on monetary terms*  
17 *comparable to the terms on which the Affiliated Company enters into similar transactions*  
18 *with unrelated third party distributors for comparable programs. Each of Company and*  
19 *Artist agrees that Company's and Artist's sole remedy against Fox for any alleged failure*  
20 *by Fox to comply with the terms of this paragraph shall be actual damages, and*  
21 *Company and Artist hereby waive any right to seek or obtain preliminary or permanent*  
22 *equitable relief or punitive relief in connection with any such alleged failure. (Emphasis*  
23 *added.)*

24  
25 **c. Arbitration:** Any dispute arising under the provisions of this Paragraph 10  
26 shall be arbitrated . . . in binding arbitration in Los Angeles, California . . . .  
27  
28

1 Plaintiffs' claims arise from Fox's alleged breach of the portion of paragraph 10(b)  
2 requiring Fox to engage in transactions with its own Affiliated Companies on monetary terms  
3 similar to its comparable transactions with unrelated third party distributors. Accordingly, this  
4 court in its April 15, 2016 Ruling, determined that this paragraph required arbitration of certain  
5 of Plaintiffs' claims. As part of its Ruling, this court noted that because the arbitration agreement  
6 in the Distribution Controls paragraph applies to "any dispute arising under Paragraph 10," the  
7 provision also applied to Plaintiffs' tort, statutory, and equitable claims, including those against  
8 both TCS and against the Affiliated Entities. (See *Bigler v. Harker School* (2013) 213  
9 Cal.App.4th 727, 739 ["A long line of California and federal cases holds that claims framed in  
10 tort are subject to contractual arbitration provisions when they arise out of the contractual  
11 relationship between the parties. . . . It is the dispute, not the named cause of action that is the  
12 focus of inquiry"] (internal citations omitted).)

13 Defendants' principal argument on these motions is that the award must be corrected  
14 because the Arbitrator "exceeded [his] powers" by awarding punitive damages when the  
15 Distribution Controls paragraph specifically disallows an award of punitive relief. (Code Civ.  
16 Proc., § 1286.2, subd. (a)(4).)

17  
18 *Parties to agreement/Third-party beneficiary*  
19

20 Plaintiffs first point out that the agreement itself defines Fox as **only** "Twentieth Century  
21 Fox Television, a unit of Twentieth Century Fox Film Corporation," and not affiliated entities,  
22 and argues that the punitive damages limitation applies only to claims brought against Fox, such  
23 that claims for punitive relief may brought against the remaining defendants (the "Affiliated  
24 Entities"). (Lens Decl., Exh. A, p. 1.)

25 Plaintiffs' argument contradicts this court's reasoning in its April 8, 2016 Ruling. The  
26 court compelled Plaintiffs to arbitrate their claims against the Affiliated Entities according to  
27 principles of agency and collateral estoppel. The court cited *Sourcing Unlimited, Inc. v. Asimco*  
28 *International, Inc.* (1st Cir. 2008) 526 F.3d 38, in which the First Circuit examined the very same

1 issue and concluded that since the claims of the nonsignatory defendant were “intertwined with  
2 the subject matter within the scope of the arbitration clause,” equitable estoppel applied such that  
3 the plaintiff was estopped from avoiding arbitration with the nonsignatory. (*Sourcing Unlimited*,  
4 *supra*, 526 F.3d at p. 47.)

5 The same reasoning applies here with respect to whether the nonsignatory Affiliated  
6 Entities can invoke the punitive damages limitation. The Affiliated Entities have the right to  
7 invoke the punitive damages limitation because the contract interference claims against the  
8 nonsignatories are inextricably intertwined with the breach of contract claims against Fox. The  
9 very same violation of Paragraph 10(b) supports both causes of action. Although TCF was  
10 originally the party which compelled arbitration (on its own behalf and on behalf of the  
11 Affiliated Entities), it is Plaintiffs who are now enjoying the benefits of arbitration; Plaintiffs are  
12 equitably estopped from reaping the rewards of having arbitrated its claims against the Affiliated  
13 Entities without also respecting the limitations to which they agreed.

14 It would be illogical for this court to hold in one Ruling that the Affiliated Entities were  
15 able to invoke the arbitration clause and compel Plaintiffs to arbitrate, and hold in another Ruling  
16 that the Affiliated Entities were not able to invoke one of the limitations in the arbitration clause.

17  
18 *Waiver by submission of issue to Arbitrator*  
19

20 Plaintiffs also argue that Fox submitted the punitive damages issue to the Arbitrator, thus  
21 granting the Arbitrator power to decide on the issue despite the language in the Distribution  
22 Controls paragraph. (Mot. Vacate, pp. 8-9.) In support of their argument, Plaintiffs cite *Safari*  
23 *Associates v. Superior Court* (2014) 231 Cal.App.4th 1400, 1410-1411, in which the fact that the  
24 parties had submitted the issue of prevailing party attorney’s fees to the arbitrator rendered the  
25 arbitrator’s decision on the attorney fee issue nonreviewable. As factual support for their  
26 argument, Plaintiffs assert that Fox expressly stipulated that Plaintiffs’ request for punitive  
27 damages were among the issues to be decided by the Arbitrator by color-coding all fully  
28 arbitrable claims in the complaint in yellow. (Kinsella Decl., Exh. E (Exh. B thereto) ¶¶ 43-52.)

1 The court does not find that Fox submitted the punitive damages issue to the arbitrator.  
2 All that the yellow highlighting shows is that Fox submitted Plaintiffs' causes of action to the  
3 arbitrator. Every paragraph of each cause of action designated by the parties as "fully arbitrable"  
4 is highlighted in full, including the parts of each claim that allege that Plaintiffs are entitled to  
5 punitive damages. The highlighted punitive damages paragraphs in the complaint are boilerplate.  
6 The court will not give an implication arising from highlighted boilerplate precedence over an  
7 express contractual term limiting the power of the arbitrator to award punitive relief. Moreover,  
8 as counsel for Fox pointed out at the hearing, (1) the parties prepared the color-coded document  
9 pursuant to *this court's* ruling on which issues were arbitrable, not as any substantive statement  
10 of the issues or remedies that the parties were stipulating were arbitrable; and (2) at no point  
11 during the arbitration proceedings did Plaintiffs advance their argument about the color-coded  
12 pages.

13 From pre-hearing to post-hearing, Fox objected to punitive relief in light of the express  
14 contractual prohibition. (Lens Decl., Exh. G at 5305-06 (Wark); 5345, 5365-66 (Brennan et al.).)  
15 Fox did not submit the question of punitive damages to the arbitrator, and accordingly, Fox did  
16 not waive the limitation.

17  
18 *Waiver by non-objection to arbitrability*  
19

20 Plaintiffs also argue that Fox waived its ability to challenge the arbitrability of the  
21 validity of the punitive damages waiver clause (as opposed to the actual question whether  
22 Plaintiff would receive punitive relief) by not raising it until closing argument. (Plaintiffs' Reply,  
23 p. 4.) This argument is not well taken. Fox never explicitly submitted to the arbitrator the  
24 question of the validity of the waiver clause, nor did Fox ever waive its objection to the  
25 arbitrability of the validity of the waiver clause by silence. On the contrary, Fox clearly and  
26 cogently raised its objections to the arbitrability of anything other than (i) Plaintiffs' 10(b) claims  
27 and (ii) the release issue. (Lens Decl, Exh. G at 5366.)  
28

1 Plaintiffs appear to insist that Fox have made the following explicit objections during  
2 arbitration proceedings in order to preserve the right to have punitive damages reviewed by this  
3 court: (1) that punitive damages were not warranted by the case; (2) that the punitive damages  
4 waiver clause was valid; and (3) that the arbitrator did not have the right to consider the validity  
5 of the waiver clause in the first place. The court will not split hairs to this degree. In reviewing  
6 the record of the arbitration proceedings, the court finds that Fox raised its objections to punitive  
7 damages in all three senses sufficiently so as to avoid waiving the issue. Moreover, as Fox's  
8 counsel pointed out at oral argument, Fox had no choice but to argue on the issue of punitive  
9 damages when the arbitrator requested briefing on the issue. Under these circumstances, the  
10 court will not interpret Fox's having argued the issue as its having capitulated to the issue.

11 Even if Fox is deemed to have agreed to allow the arbitrator to decide the validity of the  
12 punitive damages clause, as discussed below, the Arbitrator exceeded his powers by declaring  
13 the clause invalid.

14  
15 *Rational relationship*

16  
17 "The scope of an arbitrator's authority is not so broad as to include an award of remedies  
18 'expressly forbidden by the arbitration agreement or submission.' [Citation.]" (*Gueyffier v. Ann*  
19 *Summers, Ltd.* (2008) 43 Cal.4th 1179, 1185.) If a limitation on relief is set out "explicitly and  
20 unambiguously" in the parties' agreement, and the arbitrator exceeds his authority in awarding  
21 relief beyond the limitation, then the court is empowered to vacate or correct the award. (See  
22 *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 383.) On the other hand, if the  
23 court does not find any express and unambiguous restriction on the arbitrator's power, then the  
24 court's only inquiry is whether the remedy "bears a rational relationship to the underlying  
25 contract as interpreted, expressly or impliedly, by the arbitrator." (*San Francisco Housing*  
26 *Authority v. Service Employees International Union, Local 790* (2010) 182 Cal.App.4th 933,  
27 944.)  
28

1 At oral argument, Plaintiffs argued that the fact that waiver clause required interpretation  
2 by the Arbitrator demonstrated that the waiver clause was not unambiguous. The Arbitrator's  
3 interpretation of an ambiguous contract clause, argued Plaintiffs, is beyond the review of the  
4 court, and accordingly, the award must be confirmed.

5 A contract provision, however, is not ambiguous merely because it requires a modicum  
6 of interpretation. All contract terms must be interpreted; the issue here is whether and when the  
7 Arbitrator's interpretive efforts caused him to exceed the powers granted him by the parties.  
8 A contract is ambiguous "when it is capable of two or more constructions, both of which are  
9 reasonable." (*Powerline Oil Co. v. Superior Court* (37 Cal.4th 377, 390.)) Accordingly, an  
10 unambiguous contract is one that admits only one reasonable meaning. Here, the court finds that  
11 the punitive damages waiver clause is unambiguous in the context of this lawsuit. The clause  
12 waives punitive relief "in connection with" any breach by TCF of paragraph 10(b). The contract  
13 interference claims against the Affiliated Entities are quite obviously made "in connection with"  
14 TCF's breach; in fact, as this court previously ruled, the claims are inextricably intertwined.  
15 There is only one reasonable interpretation of the provision, and that is that the arbitrator did not  
16 have the power to award punitive damages on any of the claims, or against any of the parties, in  
17 this case. The arbitrator exceeded his powers by interpreting the waiver clause to mean  
18 otherwise.

19 At oral argument, Plaintiffs maintained that the court was not permitted to inquire into  
20 the reasonableness of an arbitrator's award in this way. The court does not agree. The court's job  
21 on this motion is to determine whether the arbitrator exceeded his powers. (Code Civ. Proc., §  
22 1286.2, subd. (a)(4).) Under *Advanced Micro Devices, supra*, and as the parties agreed at oral  
23 argument, an arbitrator exceeds his powers when the arbitrator ignores an "explicit[] and  
24 unambiguous[]" limitation on his powers. (*Advanced Micro Devices, supra*, 9 Cal.4th at p. 383.)  
25 Accordingly, in order to issue a ruling consistent with *Advanced Micro Devices*, the court **must**  
26 make a determination as to whether the limitation is explicit and unambiguous. Analyzing  
27 contract ambiguity, by definition, involves analyzing which interpretations of the contract are  
28



1 reasonable. Here, because the limitation was unambiguous under the only reasonable reading of  
2 the contract, the Arbitrator exceeded his powers by awarding otherwise.

3 Even if the contract contained an ambiguity with respect to the applicability of the  
4 punitive damages waiver such that the Arbitrator did not exceed his powers in interpreting the  
5 ambiguity, the court nevertheless finds that the resulting award does not bear a rational  
6 relationship to the Agreement.

7 Plaintiffs argue that the award is rationally related to the agreement because the  
8 Arbitrator determined rationally determined that the punitive damages limitation (1) did not  
9 apply to the Affiliated Entities as nonsignatories to the Agreement, and (2) was void as against  
10 public policy under Civil Code section 1668, and thus, the remedy bears a rational relationship to  
11 the underlying contract.

12 Case law runs counter to Plaintiffs' position. Here, the agreements provide that Fox and  
13 the Plaintiffs "hereby waive any right to seek or obtain preliminary or permanent equitable relief  
14 or punitive relief in connection with" any violation of Paragraph 10(b). Both Plaintiffs and Fox  
15 are sophisticated entities represented by sophisticated counsel who can be presumed to have  
16 understood both the individual and public policy ramifications of a punitive damages waiver. To  
17 flout the express terms of the parties' agreement in favor of a broadly-stated public policy in  
18 favor of recovery for those wronged ignores the clear intent of the parties. (See *Cal. Faculty*  
19 *Association v. Superior Court* (1998) 63 Cal.App.4th 935, 953 ["it is difficult to see how the  
20 violation of an express and explicit restriction on the arbitrator's powers could be considered  
21 'rationally related' to a plausible interpretation of the agreement"]; see also *Volt Information*  
22 *Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 479  
23 ["Just as [parties] may limit by contract the issues which they will arbitrate [citation], so too may  
24 they specify by contract the rules under which that arbitration will be conducted"].) Rather than  
25 offer a plausible interpretation of the contract, the Arbitrator simply "disregarded specific  
26 provisions of the plain text in an effort to prevent what the Arbitrator deemed an unfair result.  
27 Such an award is 'irrational.'" (*Aspic Engineering & Construction Co. v. EEC Centcom*  
28

1 *Constructors LLC* (9th Cir. 2019) 913 F.3d 1162, 1169.) Accordingly, in awarding punitive  
2 damages, the Arbitrator exceeded his powers.

3 The motion to confirm the award is denied, the motion to correct the award is granted.  
4 Punitive damages shall be stricken from the award. The award will be corrected and confirmed  
5 as so modified.  
6

7 *Motions to seal*  
8

9 Having ruled on the motions to confirm, correct or vacate, the court now turns to Fox's  
10 motions to seal. One motion seeks to seal Fox's own motion to vacate, and the other motion  
11 seeks to seal the unredacted version of the Arbitrator's Award (together, the "Sealed Materials").  
12 Fox brings this motion on the ground that the Sealed Materials contain non-public financial  
13 information that the parties agreed to keep confidential pursuant to a protective order filed in  
14 their arbitration proceedings. (Mot. Seal, p. 3.) The motion is unopposed.

15 California Rules of Court, Rules 2.550 and 2.551 governs sealed records. Before  
16 ordering substantive courtroom proceedings closed, or transcripts sealed, judges must hold a  
17 hearing and make factual findings supporting the order, including "(i) there exists an overriding  
18 interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest  
19 will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is  
20 narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of  
21 achieving the overriding interest. [Citation.]" (*Mercury Interactive Corp. v. Klein* (2007) 158  
22 Cal.App.4th 60, 96.) Moreover, an application to seal must be accompanied by a declaration  
23 containing facts sufficient to justify sealing. (CRC Rule 2.551(b) (1).)

24 The court finds the following with respect to these requirements:  
25

26 *Overriding interest that supports sealing.* The parties demonstrated their interest in  
27 maintaining the confidentiality of their private financial, personal, and business information by  
28 stipulating to a protective order during arbitration in which they agreed to keep this information

1 confidential. (Mot. Seal Lens Decl. ¶ 3.)

2  
3 *Interest prejudiced absent sealing.* The parties' interest in maintaining the confidentiality  
4 of their private financial information would obviously be prejudiced if the financial information  
5 is not sealed. (See *Cassidy v. California Board of Accountancy* (2013) 220 Cal.App.4th 620, 625  
6 [finding that a corporation's right of privacy and confidentiality as to its financial records would  
7 be prejudiced if the documents were not ordered sealed].)

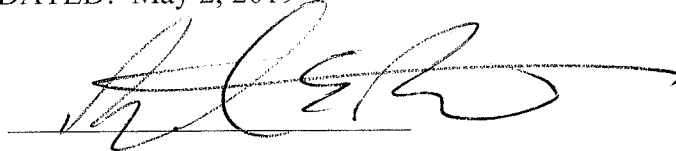
8  
9 *Narrowly tailored/no less restrictive means.* The redacted versions of the Sealed  
10 Materials are in the unsealed case file. By redacting only the confidential information from the  
11 Sealed Materials, the parties have used the least restrictive means of sealing the confidential  
12 information.

13  
14 The motions to seal are granted. The unredacted versions of the Agreement between Wark and  
15 TCF (Lens Decl., Exh. A) and the Amended Final Award (Lens Decl., Exh. C) are ordered  
16 sealed.

17 Defendants to prepare the appropriate documents.

18 Clerk to give notice.

19 DATED: May 2, 2019

20  
21 

22 RICHARD E. RICO

23 Judge of the Superior Court